

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 39 (KAISER FOUNDATION
HOSPITALS)

Respondent/the Union

and

Case 20-CB-212943

MARCELO CARRASCO, an Individual
Charging Party

Shelley Brenner, Esq., for the General Counsel.
Gary Provencher, Esq., for Respondent/the Union.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. The issues to be resolved in this matter are whether a union member received dues payment notices, and whether those notices complied with requirements set forth by the Board in *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), *enfd. sub nom. NLRB v. Hotel, Motel & Club Employees Union, Local 568*, 320 F.2d 254 (3d Cir. 1963), and its progeny. This union member, due to his alleged failure to remain in good standing by maintaining his fiduciary obligation, was removed from employment for 1 day until he paid his late dues, assessments, and reinstatement fee.

This case was tried in San Francisco, California, on July 17, 2018. Marcelo Carrasco (Carrasco or Charging Party), an individual, filed the original charge on January 11, 2018, and the General Counsel issued the complaint and notice of hearing on March 30, 2018. On June 4, 2018, the General Counsel issued a compliance specification in this matter and consolidated the compliance specification with the March 30, 2018 complaint. The General Counsel also amended the complaint on June 27, 2018. The International Union of Operating

Engineers Local 39 (Respondent or the Union)¹ filed a timely answer to the complaint, as amended, denying the alleged violations.²

5 The Union and the Employer were parties to a collective bargaining agreement which contained a union security provision requiring employees to maintain their membership in good standing by fulfilling their fiduciary obligations to the Union. The General Counsel alleges that the Union, via a January 2, 2018 letter, attempted to cause Kaiser Foundation Hospitals (the Employer) to discharge Carrasco and did cause the Employer to remove Carrasco on January 9, 2018. In addition, on January 11, 2018, after Carrasco was removed, the Union required Carrasco to pay a reinstatement fee in addition to the dues and assessments he owed before the Union would request the Employer to reinstate him. The General Counsel alleges the Union engaged in the aforementioned conduct without giving Carrasco notice of the precise amount of dues and related assessments owed, notice of the period(s) for which dues and related assessments were owed, and a reasonable period of time to pay the claimed arrearages. Due to such alleged conduct, the General Counsel alleges the Union violated Section 8(b)(2) of the National Labor Relations Act (the Act).³ The parties stipulated to the compliance allegations set forth in the compliance specification should the General Counsel prevail.

20 On the entire record,⁴ including my observation of the demeanor of witnesses,⁵ and after considering the briefs filed by the General Counsel and the Union,⁶ I make the following

25

¹ The collective-bargaining agreement indicates that that the name of the labor organization is “The International Union of Operating Engineers, *Stationary Engineers* Local 39, AFL–CIO” (emphasis added). The parties did not seek to amend or clarify the record as to the official name of the Union.

² After the hearing closed, the General Counsel and the Union motioned to reopen the record as the Union sought to amend its answer by admitting to specific paragraphs in the amended complaint. I granted the motion, and the record closed on August 17, 2018.

³ Counsel for the General Counsel, in her brief, alleges that Respondent also violated Section 8(b)(1)(A) of the Act (GC Br. at 1, 22). However, the complaint and subsequent amendments never included this additional violation of the Act. Thus, any alleged violation of Section 8(b)(1)(A) of the Act will not be addressed as not properly pled.

⁴ The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: Transcript (Tr.) 8, Line (L.) 25: “2011” should be “2018”; Tr. 11, L. 19: “compliant” should be “complaint”; Tr. 95, L. 19: “Vendor” should be “Member”.

⁵ Although I have included several citations to the evidentiary record in this decision to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those citations, but rather are based on my review of the entire record for this case.

⁶ Other abbreviations used in this decision are as follows: “GC Exh.” for the General Counsel’s exhibit; “R. Exh.” for Respondent’s exhibit; “Jt. Exh.” for joint exhibit; “GC Br.” for the General Counsel’s brief; and “R. Br.” for Respondent’s brief.

FINDINGS OF FACT

I. JURISDICTION

5 The Employer, a California non-profit corporation, has been engaged in the business of
operating acute care hospitals and related medical office facilities, including its facilities located
at 2500 Merced Avenue, San Leandro, California (San Leandro facility). During the 12-month
period ending March 30, 2018, the Employer in conducting its business operations derived gross
revenues in excess of \$250,000, and purchased and received at its San Leandro facility goods
10 valued in excess of \$5,000 directly from points outside the State of California. The Union
admits, and I find, that Kaiser Foundation Hospitals is an employer engaged in commerce within
the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within
the meaning of Section 2(14) of the Act.

15 The Union also admits, and I find, that it is a labor organization within the meaning of
Section 2(5) of the Act.

II. LABOR ORGANIZATION AND COLLECTIVE BARGAINING AGREEMENT

20 Since at least September 18, 2015, the Union has been the designated exclusive
collective-bargaining representative of the following Kaiser Foundation Hospitals' employees
(the Unit):

25 Employees performing the duties pertaining to the operation and maintenance of all
mechanical machinery and appurtenances, and such other duties as have historically and
traditionally been performed by that classification at the facility, including the job
classifications set forth in Appendix I of the collective-bargaining agreement between the
Union and the Employer effective September 18, 2015 through September 17, 2018 (the
Agreement).

30 During the relevant time period, Mark Gong (Gong) has been an agent of the Union
within the meaning of Section 2(13) of the Act.⁷

35 The Agreement includes the following relevant terms:

Article IISection 2 – Union Membership

40 All employees hired by the Employer prior to the effective date of this Agreement who
are members of [the Union] or who subsequently became members of [the Union] shall
be required as a condition of employment to maintain their membership in [the Union] in
good standing during the life of this Agreement [...]

45 All employees hired by the Employer on or after the effective date of this Agreement
shall become members in good standing in [the Union] as a condition of employment.
For these employees, tender of the initiation fee on or immediately following the thirtieth

⁷ Gong did not testify but represented the Union and attended the hearing.

(30th) day of employment and tender periodic dues uniformly required as a condition of retaining membership shall constitute good standing in [the Union]. In the event an Employee fails to become a member or to maintain membership in [the Union] in accordance with this provision, [the Union] shall notify the Employer in writing and such notice shall constitute a demand to the Employer to discharge said Employee within 48 hours for failure to maintain continuous good standing in [the Union].

(Union Security Provision). Thus, as a condition of employment, all unit employees must maintain their membership with the Union in good standing by tendering their initiation fees and periodic dues, thus maintaining their fiduciary duty.

III. THE CHARGING PARTY AND THE UNION SECURITY PROVISION

Carrasco has worked for the Employer as a biomedical equipment technician since August 2017.⁸ This position is included in the Unit. Thus Carrasco is bound by the Union Security Provision. Gong has served as Carrasco's designated Union business representative since Carrasco was hired by the Employer.

Previously, Carrasco had also been in a position represented by the Union when he worked at Sequoia Hospital from March 2014 to August 2017. While employed by Sequoia Hospital, Carrasco completed a dues check off authorization card which permitted Sequoia Hospital to automatically deduct dues from his salary, and these dues were automatically deducted every month. Gong also served as Carrasco's designated Union business agent when Carrasco worked at Sequoia Hospital.

On August 15, Gong sent Carrasco a package, to his post office box, with a letter congratulating him on his employment with the Employer and informing him of his new monthly dues rate. The letter also stated that, "If you wish to participate in Payroll Deduction [PRD] through your Employer, you must remit your current dues and balance in full by the 15th of any month in order to be eligible to participate the following month." (Jt. Exh. 7 (emphasis in original)). A dues check-off authorization card, which permitted the Employer to deduct dues from an employee's paycheck, was included with the letter, which notified Carrasco that if he wished to participate in payroll deduction, he needed to completed the enclosed cards and return them with payment in the pre-addressed envelope no later than September 10 so as to be eligible for PRD in October. Finally, the letter informed Carrasco that since the Employer participated in the Union's pension plan, he needed to complete the included enrollment form and submit those in the self-addressed envelope which was provided. The collective bargaining agreement was included in this package to Carrasco as well.

On August 29, the Union updated Carrasco's member detail report to reflect Carrasco's post office box address which he provided to the Union in March 2014 when he worked for Sequoia Hospital; this report is maintained by the Union but not provided to employees.⁹ On the same day, the Union changed Carrasco's physical address from a Pleasanton, California address

⁸ All dates hereinafter are 2017 unless otherwise specified.

⁹ Carrasco testified that he checked his post office box every two weeks, and sometimes his mother would check his post office box on his behalf.

to a Tracy, California address. In January 2018, Carrasco asked the Union to update his mailing address from his post office box address to his Tracy, California address.¹⁰

Between mid-August and early September, Carrasco called Gong to talk about his benefits. During this phone call, Carrasco mentioned to Gong that he planned to pay \$140 in dues, approximately \$9 over the amount noted in the letter from the Union, to ensure his medical benefits would not be interrupted. Carrasco testified that he mailed in a check for \$140 but did not have a copy of the cancelled check. The Union member financial detail report shows that no such payment was received. (Tr. 36-37).¹¹

10 A. September Monthly Dues Statement

Beginning on September 1, the Union sent Carrasco monthly dues statements to his post office box address. These monthly dues statements are only generated when a member is not on automatic PRD (Tr. 101). The monthly dues statements show any prior payments received, dues owed, along with charges for the Union per capita tax, defense fund fees, voice fees, and strike assessment. Each monthly dues statement informed Carrasco, in all capital letters, that he must contact his business representative of any change to his employment, address or phone number.¹² In addition, the monthly dues statement notes,

20 Dues shall be due and payable on the first business day of each calendar month. The dues for Local 39, 39-A, 39-C, and 39-D shall be computed as two (2) times the hourly rate of pay, or the base rate, whichever is greater; plus assessments. All members delinquent sixty (60) days in the payment of dues and/or assessments may, on vote of the Local Union, be suspended from Membership.

¹⁰ Deborah Bridge (Bridge), the Union’s information services manager, credibly testified that the Employer informed the Union of a change in Carrasco’s permanent address in August—from the Pleasanton, California address to the Tracy, California address. The Union continued to mail items to Carrasco’s post office box address until January 2018 when Carrasco changed his mailing address with the Union, according to Bridge. Carrasco responded vaguely when asked if he informed the Union of his Tracy, California address when he was hired by the Employer. Carrasco testified that his Tracy, California address was listed on all the forms he signed when hired by the Employer (Tr. 46-47). While it may be true that Carrasco communicated his Tracy, California address to the Employer, Carrasco did not specifically affirm that he notified the Union to change his mailing address from the post office box address to his Tracy, California address until January 2018. I cannot credit Carrasco’s claim that the Union knew of his Tracy, California address in August simply because he informed the Employer. As for the testimony of Bridge, I found her testimony to be credible due to its precise, detailed nature. Moreover, most, if not all, of Bridge’s testimony was uncontroverted.

¹¹ I cannot credit Carrasco’s testimony that he sent a check of \$140 to the Union to pay his dues. Throughout this proceeding, Carrasco could not recall many significant, relevant events at issue such as receiving the monthly dues statements. Regarding the alleged \$140 payment, Carrasco could not produce a cancelled check or any bank statement disproving the Union’s records which do not reflect such a payment.

¹² Bridge testified that members are also reminded in the monthly newsletter to inform the Union of any changes to their address (Tr. 92–93). Furthermore, Article III, Section 3 of the Union’s bylaws state, “Members shall immediately notify the Recording-Corresponding Secretary in writing of any change in their current address or employment status” (Jt. Exh. 3).

Suspended Members may be removed from employment where valid collective bargaining agreements or applicable law permits.

At the bottom of each monthly dues statement is a detachable form to include with any payment, which should be sent to the Union at the address noted on the statement.

Carrasco's September monthly dues statement indicated that a payment of \$125.27 was made on August 23, which resulted in a net credit balance of \$96.77, and a charge of \$131.17 for dues and other fees resulting in a final balance due of \$34.40 which was payable by September 30 (Tr. 108-109). Bridge testified that according to Carrasco's member financial detail report, Sequoia Hospital made a PRD payment to the Union for July on August 23. Bridge explained that employers such as Sequoia Hospital deposit money received from an employee's PRD to the Union four to six weeks *after* the money is deducted from an employee's paycheck which explains why Carrasco had a balance in his account as of September (Tr. 106). Carrasco testified that he could not recall receiving this September monthly dues statement from the Union. It is also undisputed that the September monthly dues statement did not explain from where the payment of \$125.27 came; Carrasco would only see the details of this payment from his member financial detail report which the Union did not send to him.

On September 4, Carrasco signed a union check-off authorization card to authorize automatic PRD (Jt. Exh. 8). This authorization was effective no earlier than October as long as Carrasco remitted his current dues and balance in full by the 15th of the month and would be effective until he revoked it during a specific time period.

B. October Monthly Dues Statement

The Union mailed the October monthly dues statement, dated October 2, to Carrasco at his post office box. Carrasco's dues and assessments increased slightly to \$134.47 on October 1 due to a wage increase he received (Tr. 105). Due to further payments by Sequoia Hospital, Carrasco's September balance was paid for by those payments, and he owed \$43.60 for October.¹³ Carrasco's member financial detail report, which the Union did not send to Carrasco, indicated on October 18 that, since Carrasco had an unpaid balance, his dues could not be deducted via PRD for November. Moreover, the October monthly dues statement did not explain to Carrasco how his September balance was paid—this information was contained only in the member financial detail report. The October dues were due on October 31. Carrasco testified that he could not recall receiving this October monthly dues statement from the Union.

C. November Monthly Dues Statement

The Union again mailed the November monthly dues statement to Carrasco's post office box. Along with the monthly dues and assessments of \$134.47, Carrasco still owed the October balance, for a total due of \$178.07. This amount was due on November 30. Carrasco's member financial detail report, dated November 17 and which the Union did not send to him, noted that

¹³ Sequoia Hospital made a PRD payment to the Union on September 21 which resulted in an additional \$125.27 credit balance (Jt. Exh. 4).

since Carrasco had an unpaid balance by the 15th of the month, he could not participate in PRD for December 2017.¹⁴

D. December Monthly Dues Statement

The December monthly dues statement for Carrasco was again mailed to his post office box. Along with his December assessment of \$134.47, he still had not paid the November balance of \$178.07. Thus, Carrasco owed a total of \$312.54 by December 31. Carrasco testified that he could not recall receiving this statement from the Union. On December 19, Carrasco's member financial detail report indicated that, since he still had an unpaid balance, he again could not participate in PRD for January 2018.

E. December 26 Verbal Notification of Carrasco's Late Dues and Assessments

On December 26, Gong left a message for Carrasco regarding his late dues and assessments. According to Carrasco, Gong said, "[Y]ou are -- your dues are -- you are late on your dues so you need to pay before the end of the year, your dues, because, if not, you will -- you could be suspended or even you could lose your job" (Tr. 37). Carrasco testified that this December message from Gong was the first time since mid-August to early September that he had heard from Gong (Tr. 37, 41). Carrasco stated that Gong did not tell him in this message how much he owed for his dues and assessments.¹⁵

Instead of returning Gong's phone call, Carrasco testified that, because the message sounded "urgent" he sent a check on December 26 for \$200 to cover his union dues and assessments (Tr. 38). Along with the \$200 check, Carrasco sent a letter to Gong, writing, "I sent the paperwork to have my dues deduct from my paycheck. How could we make this happen." In this letter, Carrasco included his email address and phone number, which had remained the same since at least 2014 (Jt. Exh. 6). Carrasco also included the bottom portion of his November monthly dues statement, which had a total amount due of \$178.07 (Jt. Exh. 9(c)).¹⁶ The check

¹⁴ Carrasco's member financial detail report noted, on November 20, that Gong left a message for Carrasco regarding his PRD, and that he needed to pay \$312.54 by December 15 to be eligible for PRD for January 2018. Carrasco denied receiving this phone message from Gong (Tr. 41). Gong did not testify during this proceeding despite his presence as a representative of the Union during the hearing. Gong could have testified to rebut Carrasco's claim that he did not receive a phone call from him. The Union offered no explanation for its failure to call Gong to testify. "When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988). Thus, I draw an adverse inference against Gong regarding the alleged phone call he made to Carrasco on November 20.

¹⁵ I credit Carrasco's testimony regarding this phone call from Gong. Gong did not testify, and the Union provided no explanation as to why Gong did not testify. Thus, I credit Carrasco's version of the conversation, and not Gong's notes in Carrasco's member financial detail report.

¹⁶ Carrasco testified adamantly that he could not recall receiving the November statement from the Union but on cross-examination admitted that he must have received the November statement as he included the payment stub in his December 26 correspondence to the Union (Tr. 75–76). Carrasco then admitted that he had to be reminded by the General Counsel shortly

from Carrasco showed his Tracy, California address. The Union received this letter and check on January 3, 2018.

F. Union Requests Employer to Remove Carrasco From Work for Failing to Maintain his Membership in Good Standing

On January 2, 2018, Gong sent a letter to the Employer requesting that Carrasco be removed from work due to his failure to pay dues and assessments and therefore he failed to remain in good standing with the Union (Jt. Exh. 11).¹⁷ Meanwhile, the Union continued to send Carrasco a monthly dues statement. His January 2, 2018 statement showed that he owed a total of \$447.01, which included his previous outstanding balance, and his January 2018 dues and assessments of \$134.47. (Jt. Exh. 9(e)). This total was due by January 31, 2018. Carrasco testified that he received this statement at his home address, not his post office box address (Tr. 43, 66).¹⁸

On or about January 3, 2018, Carrasco called the Union, and spoke to the secretary. Carrasco testified that the secretary told him that the Union had not received his December check, and informed him that he owed 3 to 4 months of dues and assessments, and would need to pay the reinstatement fee because he did not make the full payment by December 31 (Tr. 50–51). Carrasco stated that he asked why his payment was late since he sent a check on December 26, and the secretary responded that the Union did not receive the check due to the holidays and he needed to pay his dues and assessments or he would be suspended or lose his job. The secretary gave Carrasco the total amount of dues and assessments owed but did not inform him of the amount of the reinstatement fee. Carrasco asked to speak to Gong’s supervisor to talk “to someone else about Mark Gong” (Tr. 52).¹⁹

before the hearing that he had mailed his December 26 check to the Union at the address provided in his November monthly dues statement along with the payment stub. This lack of recall greatly undermines Carrasco’s credibility as to whether he received the monthly dues statements. However, Carrasco’s deficient memory does not impact my legal analysis of whether the Union’s monthly dues statements are legally sufficient.

¹⁷ As stated earlier, the monthly dues statements note that members delinquent sixty days in the payment of dues and/or assessments may, on vote of the local, be suspended from membership which may then result in their removal from employment. The General Counsel contends that the Union provided no evidence that a vote was held before asking the Employer to suspend Carrasco (Tr. 103). However, whether the Union complied with its internal rules is not alleged as a violation in this complaint, and will not be addressed.

¹⁸ The evidence shows that the January 2018 monthly dues statement was sent to Carrasco’s post office box address which again undermines Carrasco’s veracity for truth on the issue of receipt of the monthly dues statements (see Jt. Exh. 9(e)). The General Counsel attempts to prove that the Union mailed Carrasco’s January 2018 monthly dues statement to his Tracy, California address by entering in the record an envelope, postmarked January 3, 2018, from the Union but there is no evidence as to the actual contents of the envelope.

¹⁹ Carrasco testified that he spoke with Gong’s supervisor Shane Mortensen (Mortensen) on or about January 4, 2018 (Tr. 54). During this conversation, the issue of Carrasco’s address came up, and Carrasco testified that he asked that his Tracy, California address be used for correspondences, not his post office box address (Tr. 59–61). Also, during this call, Carrasco testified that Mortensen made a “deal” with him. I do not credit Carrasco’s testimony regarding

Carrasco testified that he also called Gong, and asked him why he would be late on his dues and assessments when he signed the check-off authorization card for automatic PRD (Tr. 53). Carrasco testified that Gong did not respond except that “they said that” he needed to pay the money or be suspended.²⁰

On about January 9, 2018, the Employer removed Carrasco from work until he could provide written proof of being in good standing with the Union.

On January 10, 2018, the Union confirmed Carrasco’s physical address in Tracy, California, and also confirmed that he still used a post office box address. When questioned regarding his receipt of union mail at his post office box address, Carrasco testified that he never received his dues statements from the Union but did receive the union monthly magazine. When asked if he agreed with the amount of money he owed to the Union, Carrasco testified that he found the increased dues amounts concerning, and explained that the January 2018 amount owed “caught his attention” as to how much he needed to pay to the Union (Tr. 81-82). Carrasco testified that he only paid a \$200 check to the Union as he thought his dues were being deducted from his paycheck; Carrasco admitted, though, that he never checked his payroll statements to see if the dues were actually being deducted.

G. The Union Requests the Employer Reinstate Carrasco After He Fulfilled the Union Security Provision By Paying his Past Dues, Assessments and Reinstatement Fee

On January 11, 2018, after Carrasco had been removed by the Employer, the Union required Carrasco to pay \$408.41 as a reinstatement fee in addition to the dues and assessments he allegedly owed in order for the Union to ask the Employer to return him to work. That same day, Carrasco sent a check to the Union for \$655.49 for his late dues and assessments from September to December as well as January 2018, and the reinstatement fee.²¹ Carrasco also signed another dues check-off authorization card for automatic PRD. Gong then sent a letter to the Employer, asking that Carrasco be reinstated as he had met all the necessary Union Security Provisions. Carrasco missed 1 day of work as the other 2 days were his regular days off.

this conversation. Carrasco provided inconsistent testimony and could not recall many significant details in this matter such as receiving the monthly dues payment notices as well as submitting the November payment stub with his December check. In contrast, Carrasco recalled significant details of his alleged conversation with Mortensen. This specific recall when compared to his vague, poor memory of receiving the monthly dues payment notices demonstrates that Carrasco was not completely forthcoming in his testimony which undermines his credibility. Moreover, whether Mortensen made a “deal” with Carrasco is not relevant, but only serves as an example of Carrasco’s selective memory.

²⁰ Carrasco’s member financial detail report contains notes from Gong’s conversation with Carrasco. These notes state that Carrasco claimed that he was never informed of his late dues, that Gong told Carrasco that the Union had been trying to reach him to no avail since November, and that if he did not pay his late dues that day the Union would be sending a letter to the Employer to suspend him. Carrasco also wanted to speak to Gong’s supervisor. Again, as Gong did not testify, I decline to rely upon on his notes, and instead rely upon Carrasco’s version of the conversation.

²¹ Although Carrasco submitted a check for \$655.49, he actually owed \$655.42.

Carrasco returned to work on January 12, 2018, and automatic PRD for his dues and assessments began in February 2018.

LEGAL STANDARD

A union violates Section 8(b)(2) if it causes or attempts to cause an employer to discharge an employee for the employee’s failure to pay dues without first providing the employee with proper notice. Furthermore, unions have a fiduciary duty to deal fairly with employees whom they seek to terminate for failure to pay dues. See *Philadelphia Sheraton Corp.*, supra; *Western Publishing Co., Inc.*, 263 NLRB 1110, 1111 (1982); *Industrial Contractors Skanska, Inc.*, 362 NLRB 1396, 1397–1398 (2015). This fiduciary duty requires that the union:

[M]ust give the employee ‘reasonable notice of the delinquency, including a statement of the precise amount and months for which dues [are] owed, as well as an explanation of the method used in computing such amount.’ In addition, the union must specify when such payments are to be made and make it clear to the employee that discharge will result from failure to pay. This fiduciary responsibility to advise an employee regarding his dues obligations requires ‘positive action,’ without regard to any concurrent obligation on the employer to provide such notice.

Western Publishing Co., supra at 1111–1112 (citations omitted). The union must give the employee a reasonable opportunity to make the payment after receipt of notification of delinquency. *Coopers NIU (Blue Green)*, 299 NLRB 720, 724 (1990), citing *United Metaltronics Local 955 (Pharmaseal Laboratories)*, 254 NLRB 601 (1981). However, the Board will excuse a union’s failure to fully comply with the notice requirements if the union proves that the employee made a “conscious decision” to “willfully and deliberately ... evade his union-security obligations.” *Ralph’s Grocery*, 209 NLRB 117, 124–125 (1974); accord *Conductron Corp.*, 183 NLRB 419, 526 (1970). But “negligence or inattention on the part of the employee will not relieve the union of its fiduciary obligation.” *Grassetto USA Construction*, 313 NLRB 674, 677 (1994).

DISCUSSION

A. THE UNION PROVIDED NOTICE TO CARRASCO OF HIS MONTHLY DUES AND ASSESSMENTS OWED TO HIS MAILING ADDRESS OF RECORD

The General Counsel contends that the Union did not properly provide Carrasco notice of his late dues and assessments because Carrasco did not receive the monthly dues statements. I disagree. The evidence shows that the Union mailed Carrasco his monthly dues statements to his mailing address of record, and I do not credit Carrasco’s testimony that he did not receive such statements. The evidence shows that the Union consistently mailed the monthly dues statement to Carrasco’s post office box address. Carrasco did not proactively change his mailing address with the Union until January 2018. In fact, Carrasco received the Union’s August 15 correspondence to his post office box address as well as the monthly union magazines. Furthermore, during cross-examination, Carrasco admitted that he must have received the November monthly dues statement since he included the November payment stub with his

December 26 check to the Union. Whether Carrasco recalled receiving these notices is not dispositive. Carrasco did not update his mailing address with the Union until January 2018, and was responsible for any mailings sent by the Union to his post office box address.

5 B. THE UNION FAILED TO FULFILL ITS FIDUCIARY DUTY TO DEAL FAIRLY WITH CARRASCO

 The General Counsel contends that even if Carrasco received the monthly dues notices, these notices did not meet the strict requirements set forth in *Philadelphia Sheraton*. Specifically, the General Counsel alleges that the Union failed to provide Carrasco with the
 10 precise amount of dues and related assessment he owed, did not provide the notice of periods for which dues and related assessments were owed, did not provide the method by which the precise amount was calculated, and did not give a firm deadline and reasonable time period to pay the
 15 claimed amount. The General Counsel claims that the each monthly dues statement does not explain the past dues amounts, and only if a member were to look at prior month's dues statements would the member be able to decipher from where the past dues came (GC Br. at 15). Moreover, even then, the General Counsel argues, Carrasco would not have been able to
 20 determine why, for the months of September and October, his monthly dues and assessments owed were less than they should have been without reviewing his member financial detail report that was maintained by the Union and not provided to Carrasco (GC Br. at 16-20). The Union
 25 disagrees, arguing that it sent Carrasco monthly notices of his dues and assessments owed to his current mailing address, and that these notices clearly explained to Carrasco what he owed, how the dues and assessments were calculated, by what date the dues were due, and the consequences of such failure.

 I find that the Union did not meet the requirements set forth by the Board. I find that the Union did send notices to Carrasco from September through January 2018 which delineated the amount of dues and assessments he owed per month. These notices also set forth how late each payment was such that by the December monthly dues statement it is clearly set forth that Carrasco owed \$43.60 past 60 days (Jt. Exh. 9(d)). By the January 2, 2018 monthly dues
 30 statement, Carrasco owed \$178.07 past 60 days (Jt. Exh. 9(e)). Each monthly dues statement informed Carrasco that delinquencies past 60 days could result in suspension from membership and removal from employment. The Union via the monthly dues statements and at least one phone call from Gong warned Carrasco of his delinquencies along with the consequences of his failure to pay his late dues.

 However, the Union failed to fulfill its fiduciary obligation completely for several reasons. First, the Union did not give Carrasco a reasonable opportunity to remedy his late dues. See *Coopers NIU*, supra. The timing of events is critical. Here, the credited evidence shows that other than the monthly dues payment notices, Carrasco only received a phone message from
 40 Gong on December 26 where Gong did not inform Carrasco of the amount he owed to remain in good standing. As a result of this ambiguous voicemail, Carrasco submitted a \$200 check to cover his late dues on December 26, and asked how to get his dues deducted from his paycheck. However, this \$200 payment was not received by the Union until January 3, 2018, one day after Gong informed the Employer of Carrasco's failure to maintain his membership in good standing
 45 and requested that Carrasco be removed from employment.

 In addition, one day after the Union requested the Employer remove Carrasco for failing to remain in good standing, the Union secretary told Carrasco he needed to pay a reinstatement

fee without specifying the amount, needed to pay his past owed dues and assessments, and told him if he did not pay these amounts he could be suspended or removed from employment for failing to remain in good standing. But by this time, Gong had already asked the Employer to remove Carrasco. Ultimately, the Employer did not suspend Carrasco until January 9, 2018, one week after receiving the Union’s request, but during that time period, Carrasco had paid at least \$200 of his past dues, which would have eliminated his over 60 day balance of \$178.07, according to the January 2, 2018 monthly dues statement.

The Union’s monthly dues notices also fail to state with certainty what will happen to an employee if he fails to remain in good standing with the Union. The Union’s monthly dues payment notices only state that an employee “may” be removed from employment, which is not “clear and unambiguous notice” of intention to cause discharge. *Distillery, Rectifying, Wine and Allied Workers’ International Union of America, Local Union 38, AFL-CIO*, 242 NLRB 370, 370 (1979).

As for whether the monthly dues notices set forth the method by which the precise amount owed was calculated, I find that these notices clearly set forth the method of calculation. However, with regard Carrasco, as he had various payments made on his behalf to the Union from his former employer, the calculation of the amount he owed is not clear. Only via Bridge’s testimony, as well as the member detailed financial report could the calculations of Carrasco’s dues and assessment be understood. The Union never provided the member detailed financial report to Carrasco nor was the information shared with Carrasco on the monthly dues statements the Union sent him. Moreover, despite having an account balance, due to his former employer’s deposits, Carrasco was not even eligible for automatic PRD when the Union sent the August letter to him inviting him to enroll in the same program. Thus, although these notices explain generally how dues and assessments are calculated, in Carrasco’s specific circumstances, the September and October monthly dues statements do not explain the sources of these credits in his account.

Finally, the Union failed to prove that Carrasco “willfully and deliberately” sought to evade his dues obligations. Of import, Carrasco had been a member in good standing of the Union with another employer for several years prior. Carrasco’s dues and assessments owed to the Union were automatically deducted via payroll for several years prior to his employment with the Employer. At most, Carrasco’s acted negligently but not willfully and deliberately.

For these reasons, I find that the Union did not fulfill its fiduciary obligation to Carrasco before informing the Employer that Carrasco failed to remain in good standing with the Union and should be removed from employment. Thus, the Union violated Section 8(b)(2) of the Act.

CONCLUSIONS OF LAW

1. International Union of Operating Engineers Local 39 (the Union) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

2. Kaiser Foundation Hospitals (the Employer) is, and has been at all times material, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union violated Section 8(b)(2) of the Act by causing the Employer to remove Marcelo Carrasco (Carrasco) for nonpayment of dues and reinstatement fees by informing the Employer that Carrasco was ineligible for work due to his failure to maintain union membership, without satisfying its fiduciary duty to Carrasco.

4. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

COMPLIANCE SPECIFICATION AND REMEDY

In this matter, the General Counsel consolidated the complaint with the compliance specification. The parties reached a stipulation as to the amount of backpay and other monetary amounts the Union would be obligated to pay in the event the General Counsel prevailed (Jt. Exh. 15).

Based upon these stipulations, the Union shall pay Carrasco \$863.29 with interest at the rate prescribed in *New Horizons*, 283 NLRB 1172 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortilla Don Chavas*, 361 NLRB 101 (2014), the Union shall compensate Carrasco for the adverse tax consequences, if any, of receiving lump sum backpay awards and file a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarter for Carrasco.

In addition, the Union shall make back pension contributions to the Stationary Engineers Local 39 Pension Trust Fund totaling \$66.88, plus any additional interest or penalty payments that have accrued against respective delinquent contributions until paid in full, assessed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

On the basis of the foregoing findings of fact, conclusions of law, compliance specification and remedy, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended²²

ORDER

International Union of Operating Engineers Local 39, San Leandro, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Causing Kaiser Foundation Hospitals (Employer) to discharge or otherwise discriminate against employees for failure to tender to the Union periodic dues, without first providing the employee notice of the amount owed, the period for which dues are owed, and the method by which the amount owed was computed, and

²² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

without providing the employee with a reasonable opportunity to pay the amount owed.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of the Board’s Order, make Marcelo Carrasco whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. The backpay owed to Carrasco is \$863.29 with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, supra, the Union shall compensate Carrasco for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

(b) In accordance with *AdvoServ of New Jersey, Inc.*, supra, the Union shall, within 21 days of this Order or Board order, submit and file with the Regional Director for Region 20 a report allocating the backpay award to the appropriate calendar year for Carrasco.

(c) The Union shall make back pension contributions to the Stationary Engineers Local 39 Pension Trust Fund totaling \$66.88, plus any additional interest or penalty payments that have accrued against respective delinquent contributions until paid in full, assessed in accordance with *Merryweather Optical Co.*, supra.

(d) Within 14 days after service by the Region, post at its facility in San Leandro, California, copies of the attached notice marked “Appendix.”²³ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Union’s authorized representative, shall be posted by the Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Union customarily communicates with its employees/members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Union has gone out of business or closed the facility involved in these proceedings, the Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by the Employer at any time since January 9, 2018.

²³ If this Order is enforced by a judgment of a United States court of appeals, the words in each of the notices referenced herein reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

- (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Union has taken to comply.

5 Dated, Washington, D.C. December 13, 2018



Amita Baman Tracy
Administrative Law Judge

10

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT cause Kaiser Foundation Hospitals (the Employer) to discharge or otherwise discriminate against you for failure to tender to us periodic dues, without first providing you notice of the amount owed, the period for which dues are owed, and the method by which the amount owed was computed, and without providing you with a reasonable opportunity to pay the amount owed.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the National Labor Relations Act.

WE WILL pay to Marcelo Carrasco backpay of \$863.29, plus interest computed and compounded daily plus the amount of any adverse tax consequences.

WE WILL file with the Regional Director for Region 20, within 21 days of the date of the Board Order, a report allocating the backpay award to the appropriate calendar year.

WE WILL make back pension contributions to the Stationary Engineers Local 30 Pension Trust Fund totaling \$66.88, plus any additional interest or penalty payments that have accrued against respective delinquent contributions until paid in full.

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 39

(Union)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CB-212943 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (628) 221-8875.